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IN THE

Supreme Court of the United States

October Term, 1958

No. 691

ERVIN WALTER BLUM, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI To The Court of Criminal Appeals of the State of Texas

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Ervin Walter Blum, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas rendered on April 9, 1958, but which did not become final until the Second Motion for Re-hearing was overruled on November 26, 1958.

OPINIONS BELOW

The District Court did not write an opinion.

The opinion of the Court of Criminal Appeals of the

State of Texas is found in 317 S.W. 2d 931. R. 18 in App. 11.

Judge Davidson's Dissenting Opinion to the overruling of the Motion for Re-Hearing is found in R. 28 App. 22.

Opinion overruling Second Motion for Re-Hearing November 26, 1958. R. 38. App. 30.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C.A. 1257 (3) in that a right guaranteed by the United States Constitution, Amendment XIV was denied the Petitioner by the Trial Court in not requiring the prosecution to furnish him statements theretofore made by important State witnesses as shown by Bill of Exception 1-A (R. 4 App. 32) and Bill of Exception 2-A (R. 9 App. 37).

Jurisdiction is further sought in that by this action of the Tiral Court, Petitioner was denied a full trial by jury as guaranteed by the VI Amendment of the United States Constitution.

The judgment of the Court of Criminal Appeals is a final judgment, and the Court of Criminal Appeals of Texas is the court of last resort in criminal matters in Texas.

FEDERAL QUESTIONS

1. Did the action of the Trial Court in refusing Petitioner's request to inspect and use on cross-examination, for impeachment purposes, written statements theretofore made by State's witnesses deprive him of due process

of law as guaranteed him by Amendment XIV of the U. S. Constitution; the statements then being available to the prosecution and being material and relevant?

2. Did such refusal by the Trial Court deprive Petitioner of a full trial by jury as guaranteed by Amendment VI of the Constitution?

Pertinent part of Amendment XIV U. S. Constitution is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Vernon's Ann. C. C. P. of Tex., Sec. 667 concerning Bills of Exception is, in part, as follows:

> "The defendant, by himself or counsel, may tender his bills of exception to any decision, opinion, order

or charge of the court or other proceedings in the case; and the Judge shall sign such bills of exception, under the rules prescribed in civil suits, in order that such decision, opinion, order, or charge may be revised upon appeal. The bills of exception may be in narrative form or by questions and answers, and no particular form of words shall be required. Where the matter about which complaint is made and the trial court's ruling thereon reasonably appear from any formal or informal bill of exception, same shall be considered upon appeal, regardless of whether or not the bill of exception is multifarious or relates to more than one subject, complaint, or objection."

Since the Bills of Exception, when approved by the Court, are considered true and correct and to reflect verity, it is thought that the questions involved herein are sufficiently reflected without the necessity of the record containing the witnesses' testimony. The Bills are full and complete in this record and the judgments of the Court of Criminal Appeals referred to quote the material parts of it. We, therefore, rely on the matters reflected in the Bills of Exception to show to this Honorable Court that Petitioner was not afforded his constitutional right of due process of law or his constitutional right of full and fair trial by jury wherein the jury was given the benefit of all of the material evidence that could have been produced by a cross-examination of the witnesses had the Petitioner's counsel had the benefit of the requested statements.

STATEMENT OF THE CASE

Petitioner was found guilty by a jury in Harris County, Texas of the offense of "failure to stop and render aid" and his punishment assessed at five years in the Penitentiary. R. 1.

The judgment and sentence was appealed to the Court of Criminal Appeals of Texas and was there affirmed as has been herein above shown.

Petitioner made a strenuous effort to be furnished a statement theretofore made by one of the State's most material witnesses, Mary Jo Montague, which she admitted having made to Houston police officers the night of the accident. There is, therefore, no question but that the statement related to the accident in question and was material and relevant.

The Trial Court, however, refused to allow Petitioner's counsel to see the statement or to use it on cross-examination of said witness or to introduce it into evidence for impeachment purposes. All of these facts are fully enumerated and complained of in said Bill of Exception which shows to have been approved by the Trial Court.

The same situation is shown by Bill of Exception 2-A as to the statement of another material witness, Jacquelyn Lois Daggs.

Both statements were in attendance of the court under a subpoena duces tecum and were later furnished for the purpose of completing these Bills of Exception, but Petitioner's request to be allowed to inspect them in aid of his cross-examination or for impeachment was denied.

This action of the Court was objected to in the District Court as is shown by the Bills of Exception, and said bills were later filed in the Court of Criminal Appeals and the questions urged there.

The Federal Constitutional questions now urged were

therefore raised in the District Court and carried to the Court of Criminal Appeals as is reflected by said Bills of Exception.

REASONS FOR ALLOWING WRIT

ARGUMENT

In *Jencks v. U. S.*, 77 S. Ct. 1007, 353 U.S. 657, 1 L. ed. 2d 1103, this Honorable Court held in a situation almost identical to the instant one, that justice required that prior made statements be furnished to the defense for him or his counsel to determine if there was material therein helpful to the Defendant on cross-examination. It was further held that it was for the defense to determine the usefulness of the documents and that the Court's mission was only to determine the materiality or the relevancy thereof.

In the instant case, there is no question of the materiality or the relevancy, but the Court still would not allow defense counsel to inspect the statements to see if they contained material that would have been helpful to the defense on cross-examination. The Court determined this matter as it did in the *Jencks* case, supra, and this is the action of the Court complained of below and relied on herein.

This Honorable Court held in the *Jencks* case:

> "A requirement of showing of conflict between testimony of government witnesses, and written reports in government's possession, as a prerequisite to an accused's right to production for inspection of documents in the government's possession, is incompatible with standards for administration of criminal justice in the federal courts, since the interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done."

It, therefore, seems quite certain that had this trial occurred in a Federal Court, this Honorable Court would promptly reverse same for the reason that the Defendant had not had a fair and impartial trial.

Since the XIV Amendment guarantees a Defendant a trial under due process of law, it seems that a trial such as this in a State Court where justice has not been done should be held to be violative of his constitutional rights.

We are aware that since the *Jencks* decision, the Congress of the United States in trying to evade or avoid its effect, has passed Sec. 3500, 18 U.S.C.A.

United States v. Leo Spangelet, 258 F. 2d 338 (C.A. 2) holds that this act is constitutional, but it will be observed that Congress did not even attempt to go so far by the passage of Sec. 3500 as to deprive the Defendant of the right to inspect the requested statement. It only goes so far as to say that the Court can first examine same to see if it is material and relevant and, if so, must then furnish it to the Defendant.

In the instant case, as has several times been related above, the Court did not allow the Defendant to inspect same to see if it would be helpful to him. The Court determined this question himself and this is the action complained of.

The above action of the Court either specifically violates the *Jencks* decision or the question has not been passed upon by this Court.

We feel that, under these circumstances, this Honorable Court should hold that Petitioner was deprived of his constitutional right of due process of law as guaranteed by the XIV Amendment.

Our second point is that the refusal of the Court to require the prosecution to furnish the Defendant the statements in question, deprived him of his right to a full and fair trial by jury as guaranteed by Amendment VI. This point is closely related to the one above and arose out of the same action of the Trial Court.

Without doubt, the right of cross-examination is as important to Defendant as is his right to be confronted by the witnesses against him and, in fact, is a part of it. This is made clear by Judge Davidson in his opinion herein, App. 22.

This Honorable Court reversed the Jencks conviction because a right of cross-examination was infringed.

In *U. S. v. Coplon*, 185 F. 2d 629, 28 A.L.R. 2d 1041, cer. den. 72 S. Ct. 362, 342 U.S. 920, 96 L. Ed. 690, the Court had before it the question of whether or not certain records made from wire taps were of evidentiary value, and the Trial Court determined, in camera, that they were not. The Second Circuit held that this action on the part of the Trial Court deprived the Defendant of his right of cross-examination and violated the terms of the Sixth Amendment. In this connection, the Court said in part:

> "If the prosecution had not had the records and had been obliged to rely upon the testimony of the 'monitors', it would certainly have been constitutionally necessary under the Sixth Amendment to examine them openly and in court;"

It, therefore, seems quite clear that if Defendant was deprived of his right of cross-examination of the witnesses before the jury, he was deprived of a right guaranteed by the Sixth Amendment. The *Jencks* case held that justice

required that Defendant be furnished statements previously made by prosecution witnesses relating to the subject under investigation.

The requested statement in the instant case related to the subject under investigation, and, under the *Jencks* holding, it was not incumbent on the Defendant to show that they contained impeachable material. He had a right to see them and determine that question for himself.

We are aware that some Courts have held that the *Jencks* decision goes no further than to lay down a rule of procedure for Federal Courts. If these decisions be correct, then this Honorable Court has not decided the constitutional question urged herein. It seems that if justice requires the production of such statements, the right stems from the Constitution because it is the criterion by which such rights are measured.

The *Coplan* case, supra, seems to bear out this theory and to show the petitioner herein was deprived of a Federal Constitutional right.

WHEREFORE, Petitioner requests that this Honorable Court grant his petition for certiorari.

Respectfully submitted,

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APPENDIX A

Ervin Walter Blum, Appellant
No. 29,545 — v. ——— Appeal from Harris County
The State of Texas, Appellee

OPINION

The offense is failure to stop and render aid, a felony; the punishment, five years.

The State offered five witnesses who were present when an automobile struck and injured Fannie Lucille Daggs, a colored cook and maid employed in a private home in River Oaks.

The injured party, who received a broken leg, testified that the car failed to stop at a stop sign, struck her and knocked her down, and ran over her leg, then backed off and came again, a man's voice saying "I'm going to kill you, you s.o.b."; that she grabbed the bumper and was dragged; that she turned loose when the car stopped and the driver backed again and drove away.

The injured party's daughter Jacquelyn, eleven years old at the time her mother was injured and twelve at the time of the trial, identified the automobile which struck her mother as that shown to belong to appellant, and positively identified appellant as the driver of the hit and run car.

Mary Jo Montague, nineteen-year old school girl who resided in River Oaks, saw the accident as she was stopped at the intersection. She gave chase in an attempt to obtain the license number of the automobile. She was shown a picture of appellant's car and asked if it was the hit and

run car, and she said "I would say it was." She based her identification upon the fact that it was a Buick, green bottom and white top with venetian blinds at the back and a "funny colored blue light over the license plate that kept the number from being plainly visible."

Mr. Zimmerman was an eye witness, the hit and run car having passed him at a rapid rate just before it struck the injured party. He heard the driver say "kill you," but did not understand anything else he said. He called to the driver to stop, saying "Stop you murderer." He described the hit and run car as a Buick, green with a lighter colored top, probably two or three years old; said it had lines like the car shown in the photographs of appellant's car and that the driver had the same "symetrical lines" as the defendant.

John Griffin testified as an eye witness and positively identified appellant as the driver and appellant's automobile as the hit and run car.

Jones, a photographer, testified that when he went to take photographs of appellant's car for appellant's insurance adjuster he heard appellant say "all this fuss over a Negro bitch" and heard the same voice say "I meant to kill the Negro bitch."

The hit and run incident was reported to police at 8:58 P. M. and was broadcast at 9:00 P. M. At 9:15 P. M., appellant called the police and reported that he had been hit in the head. When officers arrived at his apartment in answer to his call, he reported that he had been robbed of his car and his pocket book at West Gray and South Shepherd by two or three Negro men, one of whom hit him on the back of the head, and he woke up in front of his

house. He described the car he had been robbed of as a 1952 Buick, black top, light gray bottom, air conditioned Roadmaster.

The officers found no abrasions or visible bumps, and appellant produced a pocket book from his pocket but put it back and said he did not have the license number of his stolen car. Later, about 10:45 P. M., other officers went to appellant's home and interrogated him, at which time he stated that one Negro held a knife against him and punched him in the back of the neck and that was all he remembered until he came to sitting on the curb in front of his home.

The officer took appellant with him on a cruise looking for the missing car. The 1952 Buick which appellant claimed, saying "there is my automobile," was found some three hundred yards from appellant's home. The Buick so found was the Buick which was taken to the police station and was identified as the hit and run car. Appellant was also taken to the police station and to jail.

The arresting officer testified that the Buick which appellant claimed was either light green or light blue, with a lighter top—which the injured party's daughter picked out among other cars at the police station and identified as the hit and run car "without hesitation" the next morning.

Appellant did not testify and offered no testimony as to his whereabouts or the whereabouts of his car at the time of the hit and run incident. His defense consisted of impeachment and attempted impeachment of the State's witnesses and vigorous cross-examination seeking to weaken or nullify their testimony tending to identify appellant and his car as the hit and run car and driver. Reversal is

sought upon three points, all of which relate to attempted impeachment of State witnesses.

Bill of exception No. 1-A complains that the written sworn statement made by Mary Jo Montague at the police station some hour and a half after the accident was not furnished counsel for the defendant to be used for impeachment of the witness, that counsel "was not permitted to cross-examine said witness Mary Jo Montague from said statement and the statement itself was not permitted to be read to the jury."

The statement in question was produced for the purpose of the bill of exception and reads:

"My name is Mary Jo Montague. I am 18 years of age. I live at 2125 Belmeade. I am a student.

"Tonight about 8:45 P. M., July 26, 1956, I was driving a 1952 Cadillac and was going north on River Oaks Boulevard. I came to the stop sign for San Felipe and stopped. I saw a car going west on San Felipe run the stop sign at River Oaks Boulevard.

"This car went across River Oaks Boulevard and hit a pedestrian that was crossing San Felipe. It did not stop at any time when it crossed River Oaks Boulevard. The woman that the car hit was crossing the street from the north to south. She was crossing San Felipe Street.

"When the car hit her it stopped and then he started up again and was pushing her along in front of the car. He turned over toward his left curb and turned around. He pushed the woman up on the curb and then he backed up to get her off of his car. He then pulled around her and turned right off of San Felipe onto River Oaks Boulevard, heading south. There were some people screaming to get the man's license num-

ber. Then a woman came and jumped in my car and said to get his number but I couldn't see the number. I made a 'U' turn and started following him. He made a right turn off of River Oaks Boulevard onto Ella Lee. By the time I got there he was out of sight going around the circle. I got one more look at his license number. It was 2615 I think. The car was Green and white Buick about a 1950 to 1952. The top was white and the bottom was green. The car was going so fast that I couldn't see the driver very well.

"After I lost the car I returned to the scene of the accident. The woman that had been hit was still laying where the car had left her. I went over to a girl friend's house and then in about 10 minutes I came back and talked to the officers and told them what I knew. I was asked to come to the station and make this statement which I did."

Appellant points to the following testimony of Miss Montague to sustain his contention that there are significant omissions in the above statement which, at worst, support an inference of recent fabrication or, at least, an inference of over zealous coaching calculated to harm the rights of appellant. She testified that there were venetian blinds on the back of the hit and run car, that she heard a man's voice scream out "I am going to kill you," that there was a light over the license plate, and that she did not remember whether she saw any license number.

The predicate for impeaching the witness by the statement above quoted was: "Q. You told them everything you saw? A. Yes Sir, I did." The record shows that just prior to this testimony Miss Montague had testified that at the scene of the accident, and after she returned from

her pursuit of the hit and run car, she talked to no one except the policeman and "I told the policeman what I had seen and he asked me to come down to the police station"; that she did so and remained at the station about four hours; "Q. In the meantime you were being questioned about what you saw? A. Yes, Sir. Q. You told them everything you saw? A. Yes, Sir, I did." It is apparent that the witness did not testify that the written statement contained all that she saw and heard.

The first witness who testified in the case was Officer D. L. Williams, who testified that he talked to Mary Jo Montague at the scene, but not at the police station; that she told him she chased the hit and run car about three blocks, that she thought the number was 2605 or 2615, he did not remember which, "she wasn't sure of the number." Officer Williams further testified that no one at the scene of the accident had given him any description of the hit and run driver. It is significant also that Officer Williams was required to deliver to defense counsel the information he received from witnesses at the scene and noted on four cards, without which he stated he would not be able to recall what each witness told him with reference to what they had seen or observed. The record shows that appellant's counsel offered these cards in evidence, but the same are not incorporated in the record before us.

Bill No. 2-A presents a similar complaint regarding a written statement of the eleven-year old Jacquelyn Daggs. By written as well as oral motion appellant's counsel sought to obtain order of the court requiring the delivery to him of the written statement of Jacquelyn to be used for the purpose of impeaching her. This bill shows that

the statement in possession of the police was made at the police station the day following the accident, that such statement was produced and permitted to be examined by counsel for the defendant, but his request that he be permitted to cross-examine the witness from said statement and that it be admitted in evidence for the purpose of impeaching her was denied.

It was furnished for the purpose of the bill of exception and reads:

> "My name is Jacquelyn Lois Daggs. I am eleven years of age. I reside at 2806 Canfield Street, Houston, Texas. I live with my mother and father. I am in the low sixth grade, and I attend Douglass school.
>
> "Last night, July 26, 1956, sometimes after 8:00 P. M. my mother, brother and myself were coming from 3240 Delmonte street. We were walking West towards River Oaks Blvd. When we got to River Oaks Blvd. we crossed over to the West side of the street, and then started walking South on River Oaks Blvd. My mother and I were walking some distance ahead of my ten year old brother. When we got to where San Felipe crosses River Oaks Blvd. we stepped off the curb, and I saw a car coming West on San Felipe in the middle of the street, about a half a block away from us. This car ran the stop sign at San Felipe and River Oaks Blvd., which was facing him. When I say this car run this stop sign, I stopped still in my tracks, but my mother walked on to the middle of the street. This car hit my mother with it's front end, and knocked my mother up the street aways, to the West. I then ran on across the street, to the South West corner of the intersection, and ran to where my mother was laying. This car backed up off my mother and backed around into the street, heading back East on San Felipe. When this car

headed back East he ran over my mother's left leg again. I saw that the car was going to run off.

"Some man hollered and told the driver to stop, but he just went on anyway. The car turned right to go South on River Oaks Blvd. This car left the scene of the accident, going real fast. I stayed with my mother until the Police and ambulance got there and I rode away to the hospital with my mother. Just before we left for the hospital I told one of the policemen that part of the license number of the car that struck my mother was NY. I can read and write and after reading the above statement I find it to be true and correct."

Jacquelyn Daggs, the testimony shows, was one of the witnesses that had made a statement to Officer Williams at the scene of the accident, memoranda of which was furnished appellant's counsel. While the statement is not before us, it is clear from the testimony of Officer Williams that Jacquelyn gave him no description of the hit and run driver and did not furnish him the letters of the license number of the hit and run car.

Appellant's counsel sought to interrogate Officer Williams about the contents of Jacquelyn's statement made the next day when he was not present, but not as to her statement to him at the scene of the accident or omissions therefrom except as indicated above. The written statement sought to be used for impeachment purposes was made long after appellant and his automobile had been taken into custody. Omission of detailed description of either the car or the driver in a statement made at that time would not assume the importance of like omissions from a statement made at the scene before the hit and run driver and his car had been found and identified. She identified the

hit and run car, picking it out from a number of automobiles at the police station the same day.

Jacquelyn testified, in part, that she got a good look at the driver; that he had on a red and white sport shirt, "I think it was," the design "checks; it looked like litt[illegible] dice-squares"; that the car was white and blue, top part white and the bottom blue, it was a Buick; that she saw the back glass and noticed blinds "like blinds you see in a house"; and that she first noticed the venetian blinds on the car "when he was going around the corner."

In appellant's motion and requests, it was stated that the statements of Jacquelyn and of Miss Montague would exculpate appellant and establish that it was not his automobile that struck Fannie Lucille Daggs, and were materially different from their sworn testimony. We find only omissions. Jacquelyn did not at any time testify that she told the officers everything she saw or heard but, on the contrary, testified that she answered only the questions asked, and answered every question truthfully. Her statements above quoted would not have shown to the contrary and would have refuted the claimed inconsistencies and conflicts.

In addition to the facts which we have heretofore outlined and on the question of possible injury to the appellant, we observe that the only serious omission in either of the statements is that in Jacquelyn Daggs' statement she did not describe the appellant, while in her testimony she identified him. Appellant was able to produce a letter written by the witness to her mother's attorney within a week after the accident. These are the circumstances of the letter. Jacquelyn testified that she went to the office of her mother's attorney after the accident and was told

to write her version of everything she saw and mail it back to him. This she did, and in such letter, which was introduced in evidence, she does not endeavor to describe the driver of the automobile or his dress, nor does she give the make or color of the automobile, nor does she say that it had venetian blinds over the rear window. Since appellant was able to show to the jury that she made the same omissions in a written account prepared at her leisure in her own home after being instructed to write everything she could remember to her mother's lawyer, we would not feel called upon to reverse a conv tion because of the exclusion of this cumulative evidence.

The statute now applicable in the Federal courts requires the production of such statements after the witness has testified on direct examination under the penalty of having the witness's testimony at the trial stricken from the record, or a mistrial ordered. 18 U.S.C.A., sec. 3500.

It should be noted that in the Federal courts, under the statute quoted, the refusal to make such statements available to the defense does not call for a reversal of the conviction but merely requires that the trial court strike from the record the testimony of the witness who had made the prior statement.

In view of what we have heretofore said, we do not feel called upon in this case to decide whether to extend the holding in Lopez v. State, 252 S.W. 2d 701, and Dowling v. State, No. 29,637 (not yet reported), so as to make it apply after the witness had testified, apply the Federal rule or hold, as appellant asks us to do, that reversible error is reflected by the action of the court in regard to such statements. We reserve a determination of that question until we are confronted with a case in which

an accused has shown injury. Had the statements in question been tendered to the appellant and had he introduced them in evidence, they would have refuted his claim made on several occasions in the presence of the jury that such statements would have shown that the witnesses were fabricating and that his client was innocent. At most, they would show that the witnesses had failed to see that the statements which they signed contained everything which they knew about the transaction.

Appellant also asserts that the court erred in admitting in its entirety the deposition of Jacquelyn taken on May 10, 1957. Appellant himself introduced portions of the deposition, and the State offered the remainder. *Lacy v. State*, 128 S.W. 2d 1165, does not support his contention, because in that case none of the testimony at the former hearing was introduced in evidence, as it was in the case at bar, and Article 728, V.A.C.C.P., did not come into operation.

Finding no reversible error, the judgment of the trial court is affirmed.

Morrison, Presiding Judge

(Delivered April 9, 1958)

APPENDIX B

Ervin Walter Blum, Appellant
No. 29,545, v. Appeal from Harris County
The State of Texas, Appellee

DISSENTING OPINION

Appellant's motion for rehearing is overruled, without written opinion. I dissent.

A proper disposition of this case does not depend upon the question of the sufficiency of the predicate to impeach the state's witnesses Montague and Jacquelyn Daggs or the sufficiency of the testimony to impeach those witnesses.

The question here presented goes much deeper, for it directly involves the deprivation to this appellant of his right to be confronted by the witnesses against him, as guaranteed by the Constitution of this state, Art. 1, Sec. 10, which right carries with it the right of cross-examination of the witnesses.

There is no question but that the right of cross-examination is embodied in the constitutional right of confrontation. Ludwig v. State, Tex. Cr. R. , 298 S.W. 2d 166; Garcia v. State, 151 Tex. Cr. R. 593, 210 S.W. 2d 574; Paulk v. State, 107 Tex. Cr. R. 174, 296 S.W. 588.

The right of cross-examination is a condition essential to the reception of direct testimony. Testimony is not admissible if the person against whom it is to be used has no opportunity to cross-examine the witness. 44 Tex. Jur., Witnesses, Sec. 145, at p. 1142.

In the light of those rules let us see if, as he claims, appellant has been deprived of his right to cross-examine the two state's witnesses named. In the first place, it is

well to keep in mind that a felony case is tried by and before a jury. It is the jury that hears the testimony of the witnesses and passes upon their credibility. Obviously, therefore, when a witness testifies before the jury, the right to cross-examine that witness necessarily encompasses the requirement that the cross-examination be made in the presence and hearing of the jury. When the right to cross-examine the witness in the presence of the jury is cut off or denied, the constitutional right of cross-examination has been denied as also has the right of trial by jury.

Such denial is exactly what this record shows.

The cross-examination of the witnesses Montague and Jacqueline Daggs as to certain phases of their testimony was before the trial court and not before the jury.

When appellant's counsel attempted to ask the predicate questions as to certain factors contained in written statements by the witnesses shortly after the alleged unlawful act, State's counsel interposed an objection. Thereupon, the jury was withdrawn, and the questioning as to the written statements of the witnesses was conducted entirely before the court and out of the presence of the jury. The written statements of the witnesses were introduced before the trial court but were never seen or heard by the jury. At the completion of this cross-examination of the witnesses before the trial court, the state's objection was sustained and appellant was denied the right to go into the matter or to cross-examine the witnesses as to the matters developed upon the hearing before the court, including the right to introduce before the jury the written statements the witnesses had made.

Such action of the trial court of and within itself constituted a denial to the appellant of his constitutional right

to cross-examine the witnesses against him. The denial to an accused of a right guaranteed by the Constitution is, of and within itself, prejudicial error.

To say that such error could be justified or held to be immaterial to the preservation to an accused of his rights goes to the very foundation of our judicial process, which is the right of trial by jury.

But this record does show that appellant, here, was both prejudiced and injured by the trial court's action.

To demonstrate such fact it is necessary only to call attention to the testimony of the witness Montague. It will be remembered that this was the witness who, in an endeavor to obtain the license number thereof, pursued the automobile that struck the injured party.

Upon the trial, the witness denied having obtained the license number. In the written statement she made shortly after the transaction, the witness stated the license number of the automobile she followed as "2615." The license number of appellant's automobile was entirely different from that number. In other words, if what the witness said in her statement was true, then it was not appellant's automobile that was involved in the alleged unlawful act, which would be a very material defensive fact.

It occurs to me that the least preservation to this appellant of the right of cross-examination would have accorded him the right to cross-examine the witness upon that point, alone.

Other portions of the statements of the witnesses could be adverted to, but if the matter already pointed out was not a violation of the right of cross-examination then neither would those matters be in violation thereof, and no good purpose would be served in discussing them.

In addition to the error shown, there is this further matter which precludes an affirmance of this case: I call attention to the fact that the indictment was drawn under and this case was prosecuted as a violation of Art. 1150, P. C., which makes it a felony for one to fail to stop and render aid after striking a person with an automobile. The charging part of the indictment alleged as follows:

> ". . . Ervin Walter Blum on or about the 26th day of July, A. D. 1956, in said County and State was then and there the driver of, and person in control of, a motor vehicle, to wit, an automobile, upon a public highway in Harris County, Texas, and said motor vehicle which was then and there being operated by said Ervin Walter Blum, did then and there strike and collide with and cause injury to a person, to wit, Fannie Lucille Daggs, and the said Ervin Walter Blum did then and there unlawfully fail and refuse to stop after striking and colliding with the said Fannie Lucille Daggs, and did then and there drive on and leave said place where said collision occurred.
>
> "And . . . that Ervin Walter Blum, on or about the 26th day of July, A. D. 1956, in said County and State, was then and there the driver of, and person in control of a motor vehicle, to wit, an automobile, upon a public highway in Harris County, Texas, and said motor vehicle which was then and there being operated by said Ervin Walter Blum, did then and there strike and collide with and cause injury to a person, to wit, Fannie Lucille Daggs, and the said Ervin Walter Blum did then and there unlawfully fail and refuse to stop after striking and colliding with the said Fannie Lucille Daggs, and did then and there drive on and leave said place where said collision occurred, and did then and there fail to render all necessary assistance to the said Fannie Lucille Daggs, in this, to wit, he, the said Ervin

Walter Blum, did then and there fail and neglect to carry the said Fannie Lucille Daggs to a physician for medical treatment, and did then and there fail and neglect to procure a conveyance and assist in procuring a conveyance to carry the said Fannie Lucille Daggs to a place for treatment for her injuries received in said collision, said injuries to said Fannie Lucille Daggs then and there being of such a nature that such assistance was then and there required and necessary."

The indictment charged, correctly, a violation of Art. 1150, P. C.

In the case of Redding v. State, No. 29,759, delivered October 15, 1958, my brethren affirm a misdemeanor conviction for failure to stop after striking another vehicle with an automobile, which offense is denounced as a felony by Art. 1150, P. C.

In affirming that case my brethren hold that Art. 1150, P. C., including all that part thereof which made it a felony for one to fail to stop after striking another vehicle with an automobile, was repealed in 1947 by the passage of Sec. 39 of Art. 6701d, R. C. S., which makes such acts a misdemeanor.*

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*"Sec. 39. [Accident involving damage to vehicle] (a) The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 40. Every such stop shall be made without obstructing traffic more than is necessary. Any person failing to stop or to comply with said requirements under such circumstances shall be guilty of a misdemeanor."

To that conclusion I entered my dissent and, as reflected therein, I insisted that neither Art. 1150, P. C., nor any part thereof was repealed or affected by the passage of Art. 6701d, R. C. S., or any section thereof. I also insisted that if any part of Art. 1150, P. C., was repealed, as my brethren held, then that entire article had been repealed.

My brethren made no express determination that the whole of Art. 1150, P. C., was repealed by Art. 6701d, R. C. S. However, when they affirmed the county court conviction under an information in the Redding case they thereby held that Art. 1150, P. C., was no longer in existence and had been repealed, because the elements of that article were alleged and charged in the information in the Redding case.

Under those allegations the information charged a felony under Art. 1150, P. C., if that statute was in existence. I called attention to such fact in my dissenting opinion in the Redding case.

This prosecution was brought and the conviction was obtained as a violation of Art. 1150, P. C.

It is only by virtue of Art. 1150, P. C., that the indictment in this case can be sustained. There is no other statute which makes unlawful the acts alleged in the indictment here. Sec. 38 of Art. 6701d, R. C. S., can not be looked to as the statute supporting the indictment.**

** "Sec. 38. [Accidents involving death or personal injuries] (a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such acci-

Said Sec. 38 of Art. 6701d, R. C. S., makes it unlawful for the operator of any vehicle involved in an accident wherein some person is injured to fail to stop at the scene of such accident.

To charge a violation of that section, the indictment must of necessity allege that some person was either injured or killed as the result of an accident in which the driver of a vehicle was involved.

The instant indictment contains no such allegation. It does not charge, therefore, a violation of Sec. 38 of Art. 6701d, R. C. S., all of which demonstrates the correctness of my position in the Redding case, that being that Art. 1150, P.C., is now in full force and effect and has never been repealed, modified, or changed by any act of the legislature.

When my brethren hold as they did, in affirming the Redding case, then Art. 1150, P. C., was, in 1947, completely destroyed by the enactment of Art. 6701d, R. C. S., Art. 1150, P. C., could not, then, furnish the statute under which this prosecution was brought and conviction obtained.

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dent or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 40. Every such stop shall be made without obstructing traffic more than is necessary.

"(b) Any person failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment in the penitentiary not to exceed five (5) years or in jail not exceeding one (1) year or by fine not exceeding Five Thousand ($5,000.00) Dollars, or by both such fine and imprisonment."

This conviction, then, must be sustained—if at all—under Sec. 38, of Art. 6701d, R. C. S. As pointed out, the indictment wholly fails to allege the constituent elements of that statute.

If the holding in the Redding case is correct, then this conviction can not be sustained under Art. 1150, P. C., because that statute ceased to exist in 1947. If Sec. 38 of Art. 6701d, R. C. S. superseded Art. 1150, P. C., then in order to affirm this conviction under that section (Sec. 38 of Art. 6701d, R. C. S.) the indictment must allege a violation of that section.

The indictment, here, alleges a violation of Art. 1150, P. C.

Has Art. 1150, P. C., been repealed? Under the holding in the Redding case, it has been. Under the holding here, it has not been repealed.

The inconsistency in the holdings in the two cases, Redding and the instant case, is apparent.

Davidson, Judge

(Delivered October 22, 1958)

APPENDIX C

Ervin Walter Blum, Appellant
No. 29,545 v. Appeal from Harris County
The State of Texas, Appellee

OPINION
ON APPELLANT'S SECOND MOTION FOR REHEARING

It has been suggested that the jury were not permitted to hear the witness Montague on the question of the license number or any impeachment thereof. We call attention to the following portions of her direct examination in the hearing of the jury:

"Q. Did you ever get the license number of that Buick?
A. No sir. I got a number that I thought was the number.
Q. And did you turn over what you thought was the number to the police officers?
A. Yes, sir.
Q. And did they put it on the air?
A. I don't know.
Q. Are you sure of any numbers that you tried to get from that Buick—Are you sure that any of the numbers that you got were accurate or correct?
A. No sir.
Q. Did you ever tell anybody that the numbers you got off the Buick, that you were certain were accurate or correct?
A. No sir.
Q. Are you certain right now what any number of that Buick license plate was?
A. No sir."

On cross-examination by appellant's counsel, also in the hearing of the jury, we find the following:

"Q. You had already seen the numbers for a distance of at least three blocks before you got to Ella Lee, had you not, Miss Montague?
A. I don't remember whether I saw any license number.
Q. Did you make up the number you gave the officer as the number?
A. No sir.
Q. Where then, Miss Montague, did you get the number, 2615, if that was the number you gave the officer?
A. It must have been the number that I thought I saw.
Q. You mean at this time you have no recollection of having seen the license number, but that night you assumed you had seen it, and did give him the correct number, is that what you mean?
A. No sir. That night I wasn't sure those were the right numbers.
Q. Where did you get the number, such as you did give the officer, if not from the license plate?
A. They were numbers that I thought I had seen.
Q. On the license plate?
A. Yes sir."

We remain convinced of the soundness of our original opinion, and appellant's second motion for rehearing is overruled.

Morrison, Presiding Judge

Delivered November 26, 1958.

APPENDIX D

No. 78,434

	:	IN
THE STATE OF TEXAS	:	CRIMINAL DISTRICT COURT
VERSUS	:	NUMBER TWO
ERVIN W. BLUM	:	OF HARRIS COUNTY, TEXAS

FORMAL BILL OF EXCEPTION NO. 1-A

BE IT REMEMBERED that upon the trial of the above styled and numbered cause among the witnesses whose testimony was offered on behalf of the prosecution were Jacquelyn Lois Daggs and Mary Jo Montague. Mary Jo Montague testified that on the night of the accident, July 26, 1956, and about an hour and a half after the accident resulting in the failure to stop and render aid charge by the indictment, she went to the Accident Investigation Department of the City of Houston Police Station and there made, signed and swore to the facts and circumstances surrounding the accident. On direct testimony she was shown a picture of the Defendant's automobile and she testified that it resembled the car she chased and that it did not have anything that was not similar to the car she chased. She further testified that the automobile she chased was a Buick and that she did not know what model. She testified that she did not ever tell anybody that the numbers she got off the Buick she chased were accurate or correct. The witness testified (SF 278) that in her "written report", she gave the number of the car she chased and that she put beside this number "I am not sure".

At the request of Defendant's counsel, the Jury was retired. (SF 279, 280) Defendant's counsel established that the written sworn statement made the night of the accident was in the Courtroom and it was otherwise established that a subpoena duces tecum had been issued for the said statement of Mary Jo Montague to Captain J. M. LeVrier of the City of Houston Police Department and that he had appeared and produced this statement. Counsel for the Defendant demanded the statement at this time and while said witness, Mary Jo Montague, was being cross-examined, stated that his purpose was to use it for the impeachment of the said witness Mary Jo Montague. The prosecuting attorney objected to counsel for the Defendant being furnished the sworn, signed statement of Mary Jo Montague and it was not furnished him at this time. However, it was later produced, and furnished counsel for the defendant "for the purpose of a Bill of Exception only." Counsel for the Defendant was not permitted to cross-examine said witness, Mary Jo Montague, from said statement and the statement, itself, was not permitted to be read to the Jury. The statement of the said witness, Mary Jo Montague, reads as follows:

"WITNESS'S STATEMENT

RE: Major Auto Pedestrian Accident
LOCATION: San Felipe at River Oaks Blvd.
Time: 8:45 PM
DATE: July 26, 1956

"Before me, the undersigned authority, personally appeared Mary Jo Montague, who is a credible person and who after being duly sworn did depose and say:

"My name is Mary Jo Montague. I am 18 years of age. I live at 2125 Belmeade. I am a student.

"Tonight about 8:45 PM, July 26, 1956, I was driving a 1952 Cadillac and was going north on River Oaks Boulevard. I came to the stop sign for San Felipe and stopped. I saw a car going west on San Felipe run the stop sign at River Oaks Boulevard.

"This car went across River Oaks Boulevard and hit a pedestrian that was crossing San Felipe. It did not stop at any time when it crossed River Oaks Boulevard. The woman that the car hit was crossing the street from the north to south. She was crossing San Felipe street.

"When the car hit her it stopped and then he started up again and was pushing her along in front of the car. He turned over toward his left curb and turned around. He pushed the woman up on the curb and then he back up to get her off of his car. He then pulled around her and turned right off of San Felipe onto River Oaks Boulevard, heading south. There were some people screaming to get the man's license number. Then a woma came and jumped in my car and said to get his number at I couldn't see the number. I made a "U" turn and start d following him. He made a right turn off of River Oaks Boulevard onto Ella Lee. By the time I got there he was out of sight going around the circle. I got one more look at his license number. It was 2615 I think. The car was Green and white Buick about a 1950 to 1952. The top was white and the bottom was green. The car was going so fast that I couldn't see the driver very well.

"After I lost the car I returned to the scene of the accident. The woman that had been hit was still laying where the car had left her. I went over to a girl friend's house and then in about 10 minutes I came back and talked to the officers and told them what I knew. I was asked to come to the station and make this statement which I did.

"I can read and write and have read the above statement and find it to be true and correct.

Signed: Mary Jo Montague

SEAL

"Subscribed and sworn to before me this 26th day of July, 1956 AD.

Signed by V. T. Hart
Notary Public in and for Harris County, Texas."

When the above statement was finally furnished to counsel for the Defendant "for the purpose of the Bill of Exception only", counsel for the Defendant again asked permission to recall the said witness, Mary Jo Montague, for further cross-examination and that he be permitted to see said signed statement for the purpose of cross-examining her and asked that said statement be permitted to go to the Jury for its consideration and for any impeachment it might offer of the testimony of said witness on the trial of this case. The Court again refused to permit the statement to be read to the Jury or to be used for the purpose of further cross-examination of Mary Jo Montague; to which ruling of the Court the Defendant, by counsel, then and there duly excepted and here now tenders his formal Bill of Exception No. 1-A and asks that same be approved, allowed, signed by the Court and filed as a part of the record in this case.

PERCY FOREMAN
Percy Foreman
Attorney for Defendant

ORDER

THE ABOVE AND FOREGOING Bill of Exception No. 1-A is approved by the Court this the 29th day of November, 1957 and ORDERED filed by the Clerk.

(S)

LANGSTON G. KING, Judge

APPENDIX E

No. 78,434

	:	IN
THE STATE OF TEXAS	:	CRIMINAL DISTRICT COURT
VERSUS	:	NUMBER TWO
ERVIN W. BLUM	:	OF HARRIS COUNTY, TEXAS

FORMAL BILL OF EXCEPTION NO. 2-A

BE IT REMEMBERED that upon the trial of the above styled and numbered cause, the prosecution offered as a witness against the Defendant, one Jacquelyn Lois Daggs, daughter of the injured party, named in the indictment, Fannie Lucille Daggs. This witness testified that she was accompanying her mother on the night of the accident, July 26, 1956, proceeding along the west side of River Oaks Boulevard in a southerly direction at its intersection with San Felipe Road. The witness was shown a picture of the automobile belonging to the Defendant and stated (S.F. 313) unequivocally that it was the car that hit her mother. She stated (S.F. 314) that she got a good look at the man that was driving that car. She positively identified the Defendant (S.F. 315) and pointed him out as the driver of the car. She stated (S.F. 317) that the car that hit her mother was white and blue. She further testified (S.F. 318) that the "back glass" of the car that hit her mother had blinds "like you see in a house." She stated (S.F. 322) that these blinds were on the car she saw at the Police Station the next day after the accident. The witness testified on cross-examination (S.F. 366-S.F. 367) that when the Police showed her the Defendant's picture at the Police

Station she said it "looked like the man" who was driving the car that hit her mother.

While this witness was being cross-examined and before the completion of her cross-examination, Defendant's counsel stated to the Court that he had subpoenaed a written, sworn statement made by the said Jacquelyn Daggs on July 27, 1956, the day following the accident, at the City of Houston Police Station and that this statement was now in possession of Captain J. M. LeVrier of the City of Houston Police Department in response to said subpoena and said counsel asked that he be permitted to have said statement for the purpose of cross-examining said witness, Jacquelyn Lois Daggs. In addition to his verbal request, and on behalf of the Defendant, said defense counsel filed the following sworn motion, to-wit:

"No. 78,434

	:	IN
THE STATE OF TEXAS	:	CRIMINAL DISTRICT COURT
VERSUS	:	NUMBER TWO
ERVIN W. BLUM	:	OF HARRIS COUNTY, TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

"COMES NOW, Ervin W. Blum, Defendant in the above styled and numbered cause, and files this his motion to compel Captain J. M. LeVrier, of the City of Houston Police Department, to deliver for use in cross-examining the named witnesses, statements made to the accident investigating officers of said City of Houston Police Department by Jacquelyn Daggs on July 27th, 1956; Mary Jo Montague on the night of July 26, 1956; and of John Griffin and his wife, Dora Griffin, the date of their statements being unknown, but all being statements made by said witnesses concerning which the first two named wit-

nesses either have already testified or, in the case of the Griffins, are about to testify, and in support of this motion says:

I.

"The said J. M. LeVrier is a Captain and in charge of the uniform division of accident investigations and as such has under his care, custody and control the files and records of all automobile accidents in the City of Houston, and has a file of the accident that occurred at about 9:00 P. M. on July 26, 1956, at River Oaks Boulevard and San Felipe Road, in which Fannie Lucille Daggs was injured. That in this file are several signed and sworn copies of statements made by Jacquelyn Daggs, who is still on the witness stand under cross examination as this motion is filed, and by Mary Jo Montague, who has heretofore testified, and this Defendant says that such statements of said named witnesses are materially different from the sworn testimony given by such witnesses in the trial of this case, and he desires to have said written, signed and sworn copies of their statements in order to further cross-examine said Jacquelin Daggs and Mary Jo Montague and to impeach each of said witnesses by their said statements made to the Police Department. Defendant says the statements so made by said witnesses to said Police will exculpate this Defendant from responsibility for the injuries and will establish that it was not his automobile that struck Fannie Lucille Daggs.

"As to the testimony of said Jacqelin Daggs, said statement will show that each and every bit of identification of this defendant by said witness at this trial is an afterthought and that she gave no such identifying description either of this defendant's automobile or of this defendant as she has given at this trial up to the filing of this motion.

"As to the witnesses John and Dora Griffin, Defendant says that he is informed and believes that said witnesses now propose to give testimony at this trial which is en-

tirely inconsistent with any statements they have made, and their said statements will be needed when they respectively take the stand.

II.

"Defendant says that he has used due diligence to obtain these records in that he has applied for a subpoena duces tecum for said statements and caused a subpoena to be issued and served on the said J. M. LeVrier, and he is present subject to said subpoena, which application for subpoena is attached hereto and maked Exhibit "A" and which subpoena is attached and marked Exhibit "B".

"Defendant says that his attorney has made demand on the said J. M. LeVrier for said statements but has been denied the same and does not have same and that he needs and requires the said statements for his defense and in order to use them for impeaching said witness Jacquelin Daggs now on the stand and for the purpose of re-calling and impeaching witness Mary Jo Montague. Defendant says that the State relies for the conviction of this Defendant on the identification of said witnesses and without such identification he will be entitled to a not guilty instruction and he should be permitted to establish the inconsistencies and the conflicts between said statements of said witnesses to the police immediately after the accident and their testimony here more than a year later.

"WHEREFORE, premises considered, Defendant prays the Court that the cross-examination of Jacquelin Daggs be suspended so that a hearing may be had on this motion and application and that he be permitted to place witness J. M. LeVrier on the witness stand to establish the truth of the foregoing allegation and so that the court may see and determine that there is an actual conflict in the said signed statements of said witnesses, verified by them as being correct at the time they were signed, and said witness' testimony here at this trial, and upon said showing prays that said statements be ordered delivered to his counsel so that they may be used for the purpose of im-

peaching said witnesses Jacquelin Daggs; Mary Jo Montague; John Griffin and Dora Griffin, and, in the alternative, prays that said witness J. M. LeVrier be brought into the court room and ordered to deliver said statements to the attorney for this defendant for his use in impeaching said named witnesses on cross-examination.

s/ ERVIN W. BLUM
Ervin W. Blum

"THE STATE OF TEXAS
COUNTY OF HARRIS

I, Ervin W. Blum, being duly sworn, on oath deposes and say the foregoing allegations are true and correct; so help me God.

s/ ERVIN W. BLUM
Ervin W. Blum

"SUBSCRIBED and sworn to at Houston, Texas, this 26th day of August A.D., 1956.

Notary Public, Harris County, Texas

The statement of the said Jacquelyn Daggs was produced and permitted to be examined by counsel for the Defendant but counsel for the Defendant's request that he be permitted to cross-examine Jacquelyn Lois Daggs from said sworn, signed statement as well as his request that the statement itself be admitted in evidence for the purpose of impeachment if the Jury should find that it did intend to impeach said witness, Jacquelyn Lois Daggs, was overruled, refused and denied, to which action of the Court in refusing to permit the cross-examination of Jacquelyn Lois Daggs from said statement and in refusing the statement it self to be introduced in evidence, the Defendant then and there in open court excepted.

The signed and sworn statement of the said witness, Jacquelyn Lois Daggs, which defendant sought to have introduced in evidence reads as follows:

"State of Texas
County of Harris

Re: Auto-Pedestrian
Location: San Felipe-River Oaks Blvd.
Time: 8:45 P.M.
Date: July 26, 1956.

"Before me the undersigned authority this date personally appeared, Jacquelyn Lois Daggs, who is a credible person and who after being duly sworn did depose and say:

"My name is Jacquelyn Lois Daggs. I am eleven years of age. I reside at 2806 Canfield Street, Houston, Texas. I live with my mother and father. I am in the Low sixth grade, and I attend Douglass school.

"Last night, July 26, 1956, sometimes after 8:00 P.M. my mother, brother and myself were coming from 3240 Delmonte street. We were walking West towards River Oaks Blvd. When we got to River Oaks Blvd. we crossed over to the West side of the street, and then started walking South on River Oaks Blvd. My mother and I were walking some distance ahead of my ten year old brother. When we got to where San Felipe crosses River Oaks Blvd. we stepped off the curb, and I saw a car coming West on San Felipe in the middle of the street, about a half a block away from us. This car ran the stop sign at San Felipe and River Oaks Blvd., which was facing him. When I say this car run this stop sign, I stopped still in my tracks, but my mother walked on to the middle of the street. This car hit my mother with *it's* front end, and knocked my mother up the street aways, to the West. I then ran on across the street, to the South West corner of the intersection, and ran to where my mother was laying. This car backed up off my mother and backed around into the street, heading back East on San Felipe. When this car headed back East he ran over my mother's left leg again. I saw that the car was going to run off. Some man hollered

and told the driver to stop, but he just went on anyway. The car turned right to go South on River Oaks Blvd. This car left the scene of the accident, going real fast. I stayed with my mother until the Police and ambulance got there and I rode away to the hospital with my mother. Just before we left for the hospital I told one of the policeman that part of the license number of the car struck my mother was NY.

"I can read and write and after reading the above statement I find it to be true and correct.

s/ Jacquelyn L. Daggs
Jacquelyn Lois Daggs.

SEAL

"Subscribeed to and sworn to before me this 27th day of July 1956 A.D.

s/ E. O. Windham
Notary Public in and for
Harris County, Texas."

AND NOW, the Defendant here now tenders his Formal Bill of Exception No. 2-A and asks that the same be approved, allowed, signed by the Court and filed as a part of the record in this case.

(S)

PERCY FOREMAN
Attorney for Defendant.

ORDER

The above and foregoing Bill of Exception is approved by the Court this 29th day of November, A.D. 1957 and ORDERED filed by the Clerk.

(S)

LANGSTON G. KING
Judge